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TEXAS CIVIL PROCEDURE

by

Ernest E. Figari, Jr.*

MAJOR developments in the field of civil procedure during the survey period include judicial decisions, statutory enactments,¹ and amendments to the Texas Rules of Civil Procedure.² This *Survey* will examine these developments and consider their impact on existing Texas procedure.

I. JURISDICTION OVER THE PERSON

The propriety of out-of-state service under article 2031b,³ the Texas long-arm statute, continues to be the subject of considerable appellate attention. Section 6 of article 2031b states that service may be effected under the statute by serving process upon the secretary of state, who shall be conclusively presumed to be authorized to receive service, "provided that the Secretary of State shall forward a copy of such service to the person" being sued.⁴ This proviso has created uncertainty for plaintiffs who seek to establish a record that a defaulting nonresident was served under article 2031b in the required manner. Is the record perfected through the filing of a citation and return showing service on the secretary of state? Or, must the record show compliance with the additional statutory requirement that the secretary of state forward a copy of the process to the nonresident defendant? In a decision of major importance, the Texas Supreme Court in *Whitney v. L & L Realty Corp.*⁵ concluded that service under article 2031b is not completed until process is forwarded to the defendant. Thus, "a showing in the record that the Secretary of State forwarded a copy of the process is essential to establish the jurisdiction of the court over the defendants' persons."⁶ The required showing may, of course, take the form of a certificate of mailing which is available from the secretary of state for a small fee.⁷

The opinion in *Jetco Electronic Industries, Inc. v. Gardiner*,⁸ a recent decision of the United States Court of Appeals for the Fifth Circuit, is a virtual guidebook to the problems facing a plaintiff seeking to invoke article 2031b. Contrary to several state court decisions,⁹ the Fifth Circuit con-

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1. The enactments which have procedural implications principally concern venue. See TEX. REV. CIV. STAT. ANN. art. 1995, subds. 5, 31 (Supp. 1973). These enactments became effective Aug. 27, 1973.

2. As a result of the amendments, 3 Texas Rules of Civil Procedure were modified. These changes became effective Sept. 1, 1973. See *Civil Procedure Rules Amended*, 36 TEX. B.J. 495 (1973).

3. TEX. REV. CIV. STAT. ANN. art. 2031b (1964).

4. *Id.* § 6.

5. 500 S.W.2d 94 (Tex. 1973). See Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 27 Sw. L.J. 182, 183 (1973).

6. 500 S.W.2d at 96.

7. See *Professional Headnotes*, 36 TEX. B.J. 1117-18 (1973).

8. 473 F.2d 1228 (5th Cir. 1973).

9. *E.g.*, *Hoppenfeld v. Crook*, 498 S.W.2d 52 (Tex. Civ. App.—Austin 1973), *er-*

cluded that the "[p]laintiff has the burden of proving that defendant is amenable to process under the forum state's jurisdiction statute."¹⁰ A plaintiff is not, however, required to prove a defendant's amenability to process under the forum's jurisdictional statute by a preponderance of the evidence. Rather, a plaintiff meets his burden by making merely a prima facie showing of the minimum contacts necessary to support jurisdiction.¹¹

Gardiner is also informative in its interpretation of article 2031b. Section 3 of that article authorizes the exercise of jurisdiction over a nonresident when he is "doing business" in Texas.¹² "Doing business," as defined by section 4, includes "the committing of any tort in whole or in part in this State."¹³ Focusing on section 4, the Fifth Circuit found that "[i]t is immaterial that the tortious act occurred outside the state, for it is well established that the statute extends to injury occurring within the state as a result of a wrongful act committed outside the state."¹⁴

Declaring what had been more hesitatingly suggested in earlier cases,¹⁵ the Fifth Circuit proclaimed that the "stream of commerce" theory is applicable to the determination of whether a defendant is amenable to service under article 2031b.¹⁶ To the delight of those plaintiffs who resort to article 2031b, the court held that "[w]hen a nonresident defendant introduces a product into interstate commerce under circumstances that make it reasonable to expect that the product may enter the forum state, the forum may assert jurisdiction over the defendant in a suit arising out of injury caused by the product in the forum"¹⁷

Straining the long-arm of article 2031b, a federal district court had concluded during a previous survey period that the Texas activities of a subsidiary corporation should be imputed to its parent for jurisdictional purposes, thereby allowing the court to sustain nonresident service on the parent.¹⁸ A welcomed retraction of this extension of the long-arm statute occurred in *Frito-Lay, Inc. v. Procter & Gamble Co.*¹⁹ The plaintiff brought suit in federal district court against two corporate defendants, one a subsidiary of the other, seeking a declaratory judgment of the invalidity of a patent owned by the parent company. The subsidiary was served with process through its registered agent, but service on the parent corporation, which was neither incorporated nor licensed to do business in Texas, was attempted

ror ref. n.r.e.; *Taylor v. American Emery Wheel Works*, 480 S.W.2d 26 (Tex. Civ. App.—Corpus Christi 1972); *Roquemore v. Roquemore*, 431 S.W.2d 595 (Tex. Civ. App.—Corpus Christi 1968).

10. 473 F.2d at 1232; *accord*, *Tetco Metal Prods., Inc. v. Langham*, 387 F.2d 721 (5th Cir. 1968).

11. 473 F.2d at 1232; *accord*, *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971).

12. TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (1964).

13. *Id.* § 4.

14. 473 F.2d at 1232 n.5.

15. *See, e.g.*, *Coulter v. Sears, Roebuck & Co.*, 426 F.2d 1315 (5th Cir. 1970); *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969).

16. 473 F.2d at 1234. *See generally* *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969) (2-1 decision).

17. 473 F.2d at 1234.

18. *Bland v. Kentucky Fried Chicken Corp.*, 338 F. Supp. 871 (S.D. Tex. 1971); *see Figari, supra* note 5, at 183.

19. 364 F. Supp. 243 (N.D. Tex. 1973).

under article 2031b. The parent corporation filed a motion to dismiss for lack of personal jurisdiction, and the plaintiff responded with the contention that the subsidiary was "an alter ego" of the parent.²⁰ While the parent corporation owned all of the common stock of the subsidiary, maintained interlocking directorates and officers with the subsidiary, and exercised control over the business decisions of the subsidiary, corporate separateness was strictly maintained. Observing that the facts presented did not establish "a prima facie showing of actual control of the internal affairs of the subsidiary by the parent," the federal district court properly concluded that the Texas activities of the subsidiary could not be imputed to the parent for jurisdictional purposes.²¹

II. SPECIAL APPEARANCE

Rule 120a,²² which establishes the conditions of special appearances to challenge personal jurisdiction, requires that such an appearance "shall be made by sworn motion" filed prior to any other pleading or motion. Interpreting the rule strictly, the court in *Stewart v. Walton Enterprises, Inc.*²³ concluded that the filing of an unsworn contest to personal jurisdiction constituted a general appearance and subjected the movant to the jurisdiction of the court for all purposes.

III. SUBSTITUTED SERVICE

Where service on a resident in person is not practical, rule 106²⁴ authorizes the trial court to order substituted service to be made by leaving a copy of the citation, with petition attached, at the usual place of business of the defendant to be served, or by delivering it to any one over sixteen years of age at the defendant's usual place of abode. Invalidating a substituted service ordered on the basis of an unsworn motion, the court of civil appeals in *Kirkegaard v. First City National Bank* concluded that a showing of the impracticality of personal service is essential to an authorization of substituted service under rule 106.²⁵

IV. VENUE

The most significant development in venue practice came in the form of two additions to article 1995.²⁶ The first, aimed at the elimination of distant forum abuses in consumer transactions,²⁷ was an amend-

20. *Id.* at 245.

21. *Id.* at 249-50.

22. TEX. R. CIV. P. 120a.

23. 496 S.W.2d 956 (Tex. Civ. App.—Austin 1973), *error ref. n.r.e.*; *accord*, *Austin Rankin Corp. v. Cadillac Pool Corp.*, 421 S.W.2d 733 (Tex. Civ. App.—Beaumont 1967).

24. TEX. R. CIV. P. 106.

25. 486 S.W.2d 893 (Tex. Civ. App.—Beaumont 1972). Even if an evidentiary showing had been made, however, the court noted that the service itself was defective because of the failure of the sheriff's return to reveal full compliance with rule 106. *Id.* at 895.

26. TEX. REV. CIV. STAT. ANN. art. 1995, subds. 5, 31 (Supp. 1973).

27. See Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEXAS L. REV. 269 (1973).

ment to subdivision 5 which requires creditors to sue consumers in a forum bearing a genuine relationship to either the execution of their contract or the defendant's domicile. Now consisting of two subsections, subdivision 5 retains its former provisions in the first subsection.²⁸ The addition of a second subsection acts to eliminate the distant forum abuses by providing that in an action upon a contract arising out of a "consumer transaction," suit by a "creditor" upon the contract may be brought against the defendant either "in the county in which the defendant in fact signed the contract" or "in the county in which the defendant resides at the time of the commencement of the action."²⁹

Subdivision 31, which is completely new, governs the venue of a suit for breach of warranty. It permits "suits for breach of warranty by a manufacturer of consumer goods" to be brought either "in any county where the cause of action or a part thereof accrued, or in any county where such manufacturer may have an agency or representative, or in the county in which the principal office of such company may be situated, or in the county where the plaintiff or plaintiffs reside."³⁰

Several judicial decisions during the survey period also have had an impact on Texas venue practice. In *Wilson's Pharmacy, Inc. v. Behrens Drug Co.*³¹ the supreme court considered whether all venue facts relied upon by a plaintiff must be alleged in both his petition and controverting plea. The plaintiff brought suit in McLennan County on a sworn account for merchandise sold to the defendant drugstores. The defendants filed pleas of privilege asserting their right to be sued in Harris County, but the plaintiff responded with a controverting plea alleging that the sales were made pursuant to a written contract in which the defendants had agreed to make payment in McLennan County. Although mention of the written contract was made for the first time in the controverting plea, the trial court overruled the pleas of privilege on the basis of former subdivision 5,³² which allowed a suit to be maintained in the county where a defendant has contracted in writing to perform an obligation. Settling a conflict in decisions of the courts of

28. The first subsection, TEX. REV. CIV. STAT. ANN. art. 1995, subd. 5(a) (Supp. 1973), provides:

(a) Subject to the provisions of Subsection (b), if a person has contracted in writing to perform an obligation in a particular county, expressly naming such county, or a definite place therein, by such writing, suit upon or by reason of such obligation may be brought against him, either in such county or where the defendant has his domicile.

29. TEX. REV. CIV. STAT. ANN. art. 1995, subd. 5(b) (Supp. 1973), provides:

(b) In an action founded upon a contractual obligation of the defendant to pay money arising out of or based upon a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household or agricultural use, suit by a creditor upon or by reason of such obligation may be brought against the defendant either in the county in which defendant in fact signed the contract, or in the county in which the defendant resides at the time of the commencement of the action. No term or statement contained in an obligation described in this subsection shall constitute a waiver of this provision.

30. TEX. REV. CIV. STAT. ANN. art. 1995, subd. 31 (Supp. 1973).

31. 494 S.W.2d 161 (Tex. 1973).

32. Ch. 213, § 1, [1935] Tex. Laws 503, presently TEX. REV. CIV. STAT. ANN. art. 1995, subd. 5(a) (Supp. 1973).

civil appeals,³³ the Texas Supreme Court held that "some venue facts may properly be alleged in the controverting plea without being set up in the petition."³⁴

Under subdivision 29a of article 1995,³⁵ which governs the venue of a multiple defendant case, a suit brought against one defendant in a county where venue is proper as to that defendant may be maintained in such county as to other defendants provided they are "necessary parties" to the suit. Reaffirming its earlier delineation of the necessary party requirement,³⁶ the supreme court in *Loop Cold Storage Co. v. South Texas Packers, Inc.*³⁷ concluded that the requirement is not satisfied unless the plaintiff can prove that "no effectual decree could be rendered" without the joinder of the additional defendants.

Arising under subdivision 23,³⁸ and of particular interest to insurance defense counsel, is the decision of the supreme court in *Employers Casualty Co. v. Clark*.³⁹ The plaintiffs brought suit against a corporate insurer to recover under an uninsured motorist provision of a family automobile liability policy. The insurer filed a plea of privilege, and the plaintiffs responded with a controverting plea which sought to maintain venue under subdivision 23. Subdivision 23 authorizes suits against a corporation to be brought in the county where the plaintiff resided "at the time the cause of action or part thereof arose," provided the corporation has an agent or representative in such county. At the venue hearing it was shown that the accident took place in the county of suit and that the plaintiffs resided there at the time, but no evidence was adduced that the motorist causing the accident was "uninsured" within the meaning of the policy. Consequently, the defendant argued that there was no showing of the elements necessary to maintenance of the cause of action. The trial court denied the plea of privilege, and the court of civil appeals affirmed, stating that it was not necessary for the plaintiffs to prove a breach of the insurance contract as the statute required only proof of some element or part of the alleged cause of action. Reversing the denial of the plea of privilege, the supreme court concluded that when the suit is for breach of contract and venue is sought to be maintained under subdivision 23, it is essential that a plaintiff prove both a contractual right and a breach thereof.

Subdivision 11 of article 1995,⁴⁰ which provides that "[i]f the defendant has inherited an estate concerning which the suit is commenced, suit may be brought in the county where such estate principally lies," was construed

33. Compare *Wilson's Pharmacy, Inc. v. Behrens Drug Co.*, 481 S.W.2d 908 (Tex. Civ. App.—Waco 1972), with *Reader's Wholesale Distrib., Inc. v. Trahan*, 225 S.W.2d 459 (Tex. Civ. App.—Galveston 1949). See also *Price v. Murrell R. Tripp & Co.*, 268 S.W.2d 702 (Tex. Civ. App.—El Paso 1954); *Elliot Fin. Co. v. Brown*, 208 S.W.2d 622 (Tex. Civ. App.—Galveston 1948).

34. 494 S.W.2d at 164.

35. TEX. REV. CIV. STAT. ANN. art. 1995, subd. 29a (1964).

36. E.g., *Ladner v. Reliance Corp.*, 156 Tex. 158, 293 S.W.2d 758 (1956).

37. 491 S.W.2d 106, 108 (Tex. 1973).

38. TEX. REV. CIV. STAT. ANN. art. 1995, subd. 23 (1964).

39. 491 S.W.2d 661 (Tex. 1973).

40. TEX. REV. CIV. STAT. ANN. art. 1995, subd. 11 (1964).

for the first time in *Deason v. Rogers*.⁴¹ The plaintiffs, stepdaughters of the testator, brought suit against the testator's son, seeking to establish their rights under a certain will executed by the testator. Concluding that the word "inherited," as used in subdivision 11, should include property "obtained by either devise or descent," the court of civil appeals allowed the suit to be maintained in the county where the estate was principally located.⁴²

Subdivision 6⁴³ authorizes suit against an executor, administrator or guardian to establish a money demand with respect to the estate which he represents to be maintained "in the county in which such estate is administered." Since an *independent* executor acts independently of the orders of the probate court in which the will is probated, the applicability of subdivision 6 to a suit against an independent executor has been uncertain. When faced with the question, the Dallas court of civil appeals in *Gambill v. Mathes*⁴⁴ gave a broad interpretation to subdivision 6, holding that an estate is "administered" by an independent executor in the county where the will was probated.

Two cases during the survey period concerned the requirement of rule 86⁴⁵ that a party seeking to oppose a plea of privilege shall file a controverting plea "under oath" within ten days. Testing the strictness of this requirement is the situation considered in *Lorenzo Grain Co-Op v. Rangel*.⁴⁶ The plaintiff, intending to contest the defendant's plea of privilege, filed a controverting plea within the required time, but inadvertently omitted the verification. At the venue hearing the defendant objected to the omission, but the trial court permitted an amended controverting plea, identical to the original except for being verified. Noting a conflict in the decisions on this point,⁴⁷ the Amarillo court of civil appeals concluded that the unsworn controverting plea was not fatally defective and that the verification amendment was properly permitted.⁴⁸ The second case, *Cactus Drilling Corp. v. Hager*,⁴⁹ concerned a controverting plea which recited that its allegations were true to the best of the affiant's "knowledge and belief."⁵⁰ Conceding that this was not the unequivocal verification required by rule 86, the court nevertheless concluded that the controverting plea was not fatally de-

41. 499 S.W.2d 14 (Tex. Civ. App.—Corpus Christi 1973), *error dismissed w.o.j.*

42. *Id.* at 17.

43. TEX. REV. CIV. STAT. ANN. art. 1995, subd. 6 (1964).

44. 490 S.W.2d 863 (Tex. Civ. App.—Dallas 1973), *error dismissed; accord*, *Amberson v. F.G. Rodgers & Co.*, 271 S.W.2d 846 (Tex. Civ. App.—San Antonio 1954), *error dismissed*.

45. TEX. R. CIV. P. 86.

46. 491 S.W.2d 702 (Tex. Civ. App.—Amarillo 1973).

47. Compare *M.C. Winters, Inc. v. Lawless*, 407 S.W.2d 275 (Tex. Civ. App.—Dallas 1966), *error dismissed*; *Farmer v. Cassity*, 252 S.W.2d 788 (Tex. Civ. App.—Beaumont 1952), and *Continental Fire & Cas. Ins. Corp. v. Whitlock*, 215 S.W.2d 657 (Tex. Civ. App.—Amarillo 1948), with *H.E. Butt Grocery Co. v. Vaught*, 413 S.W.2d 940, 942 (Tex. Civ. App.—San Antonio 1967), *error dismissed*, *Globe Fin. & Thrift Co. v. Thompson*, 412 S.W.2d 955 (Tex. Civ. App.—Fort Worth 1967), and *Eastland v. Whitman*, 318 S.W.2d 447 (Tex. Civ. App.—Houston 1958).

48. 491 S.W.2d at 704.

49. 487 S.W.2d 758 (Tex. Civ. App.—El Paso 1972).

50. *Id.* at 760.

fective.⁵¹ Moreover, since the deficiency in the controverting plea could have been cured by amendment, reasoned the court, the plaintiff's failure to lodge an objection constituted a waiver of the defect.

*Thompson v. Thompson*⁵² demonstrates the value of rule 21a⁵³ in the context of a venue contest. The defendants filed their pleas of privilege on December 22, and the plaintiff received copies of the pleas the following day by registered mail. Although rule 86⁵⁴ requires that a controverting plea be filed within ten days after the receipt by a party of a copy of the plea of privilege, the plaintiff did not file her controverting plea until January 5. Concluding that the controverting plea was untimely, the trial court sustained the pleas of privilege. However, rule 21a, which permits service of documents to be made by registered mail, states that whenever a party is required to do some act within a prescribed period after service upon him by mail, "three days shall be added to the prescribed period."⁵⁵ On the basis of rule 21a, the court of civil appeals concluded that the plaintiff had 13 days after receipt of the pleas in which to file her controverting plea.

V. PLEADINGS

The most significant case during the survey period dealing with pleading requirements was *Dairyland County Mutual Insurance Co. v. Roman*.⁵⁶ The plaintiff brought suit on an automobile insurance policy, alleging generally that he had complied with all conditions precedent under the policy. Rule 54⁵⁷ provides that a party who avers the performance of conditions precedent "shall be required to prove only such of them as are specifically denied by the opposite party." Seeking to invoke rule 54, the defendant alleged that the "[p]laintiff has solely [*sic*] failed to comply with the conditions of said policy, to wit," followed by a copy of the entire set of conditions contained in the policy.⁵⁸ One of the conditions of the policy required the plaintiff to give the insurer written notice of any accident covered by the policy as soon as practical. Despite a request by the insurer, the trial court refused to submit an issue to the jury inquiring whether written notice was given as soon as practical. Intending to discourage the use of shotgun pleadings, the Texas Supreme Court concluded "that where the plaintiff avers generally that all conditions precedent have been performed and no attempt is made to raise an issue of notice except by a sham pleading, the defendant is not entitled to a reversal on the ground that the plaintiff failed to establish that a written notice condition was performed"⁵⁹

Rule 185⁶⁰ provides that a suit on sworn account "shall be taken as prima

51. *Id.* at 761. *Contra*, *Globe Fin. & Thrift Co. v. Thompson*, 412 S.W.2d 955 (Tex. Civ. App.—Fort Worth 1967).

52. 487 S.W.2d 436 (Tex. Civ. App.—Houston [1st Dist.] 1972).

53. TEX. R. CIV. P. 21a.

54. TEX. R. CIV. P. 86.

55. TEX. R. CIV. P. 21a.

56. 498 S.W.2d 154 (Tex. 1973) (2d case).

57. TEX. R. CIV. P. 54.

58. 498 S.W.2d at 158.

59. *Id.* at 156.

60. TEX. R. CIV. P. 185.

facie evidence thereof, unless the party resisting such claim shall . . . file a written denial, under oath" stating specifically why the account is not just and true. The court of civil appeals, in *Smith v. West Texas Hospital, Inc.*,⁶¹ held that the verified denial requirement of rule 185 is not applicable to a defendant who was not a party to the transactions underlying the sworn account.

A petition containing a prayer that the plaintiff be awarded "such other and further relief, general and special in law and in equity, including costs of court, to which Plaintiff shall be entitled" was held in *Combined Insurance Co. of America v. Kennedy*⁶² to authorize the recovery of prejudgment interest.

VI. LIMITATIONS

*Hays v. Hall*⁶³ represents another step toward the long-awaited application of the "discovery rule" to the running of the statute of limitations in all professional malpractice cases. Observing that the unsuccessful vasectomy would be difficult to detect without the superior knowledge of a physician, the Supreme Court of Texas concluded⁶⁴ that the applicable statute of limitations commences to run on the date of the discovery of the true facts, or on the date discovery should reasonably have been made.⁶⁵

Section 2.725 of the Texas Business and Commerce Code⁶⁶ provides that "[a]n action for breach of any contract of sale must be commenced within four years after the cause of action has accrued." In a case of first impression the court of civil appeals, in *Ideal Builders Hardware Co. v. Cross Construction Co.*,⁶⁷ held that section 2.725 extends to four years the statute of limitations applicable to an open account or oral contract for the sale of goods and materials.⁶⁸

VII. PARTIES

*Phillips v. Teinert*⁶⁹ is a warning that the legal representatives or successors of a plaintiff who dies after suit is filed and prior to trial should always be joined as parties to the suit. Observing that the successors of the plaintiff had a direct interest in the subject matter of the suit and that their interests would necessarily be affected by any judgment rendered, the court of

61. 487 S.W.2d 143 (Tex. Civ. App.—Amarillo 1972).

62. 495 S.W.2d 306 (Tex. Civ. App.—Eastland 1973), *error ref. n.r.e.*

63. 488 S.W.2d 412 (Tex. 1972).

64. In a similar fact situation the supreme court applied the discovery rule where the defendant had severed the vagus nerve of the plaintiff during surgery. *Nichols v. Smith*, 17 Tex. Sup. Ct. J. 57 (1973). Upon rehearing the case, the supreme court withdrew this opinion, issuing a new opinion which decided the case on another issue. *Nichols v. Smith*, 17 Tex. Sup. Ct. J. 220 (1974).

65. 488 S.W.2d at 414; *see Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967). *See generally* Comment, *Professional Negligence*, 121 U. PA. L. REV. 627 (1973).

66. TEX. BUS. & COMM. CODE ANN. § 2.725 (1968).

67. 491 S.W.2d 228 (Tex. Civ. App.—Houston [1st Dist.] 1972).

68. 491 S.W.2d at 230; *see* UNIFORM COMMERCIAL CODE § 2.725, Comment; Spies, *Uniform Commercial Code: Article 2—Sales Performance and Remedies*, 44 TEXAS L. REV. 629, 638-39 (1966); Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 23 Sw. L.J. 88, 93 (1969).

69. 493 S.W.2d 584 (Tex. Civ. App.—Houston [14th Dist.] 1973) (2-1 decision).

civil appeals concluded that they became indispensable parties upon the death of the plaintiff.⁷⁰

Setting aside a judgment rendered against the maker in a suit on a note brought by one of the two payees, the court in *Hinojosa v. Love*⁷¹ held that the other payee was an indispensable plaintiff whose joinder was essential.

VIII. DISCOVERY

Upon motion showing "good cause," rule 167⁷² authorizes the discovery of any insurance agreement under which an insurance company may be liable for all or a portion of the recovery sought in the action. Making clear its intent to encourage settlement, the Texas Supreme Court, in *Carroll Cable Co. v. Miller*,⁷³ concluded that "[i]t is sufficient showing of good cause that an insurance agreement is not available to the moving party and that the information is needed to determine settlement and litigation strategy."⁷⁴

*Fireman's Fund Insurance Co. v. Commercial Standard Insurance Co.*⁷⁵ illustrates the proper use of a request for admission of fact under rule 169.⁷⁶ The plaintiffs submitted a set of requests for admission of fact to the defendants, attaching as an exhibit a transcript of the testimony of a witness at the earlier trial of a related case. One request asked the defendants to admit that the transcript was a correct copy of the testimony that the witness had given at the earlier trial, and another request asked the defendants to admit that the testimony was true. The defendants objected to both requests, contending that they were outside the scope of rule 169. Subject to this objection, the defendants stated that they were without sufficient information to admit or deny the requests. Since the defendants did not comply with that portion of rule 169 which requires a sworn statement setting forth in detail the reasons why they cannot truthfully either admit or deny the requests, the trial court granted additional time for the defendants to file a verified response, and upon failing to do so, the requests were deemed admitted. Affirming the ruling of the trial court as to the first request, the supreme court observed that the use of rule 169 extends not only to matters of fact within the knowledge of a litigant, but to matters readily ascertainable by the litigant of whom the request is made. Thus, reasoned the court, the defendants "should have ascertained the accuracy of this transcript from the court reporter if that could have been done without cost or considerable burden," and "[i]f not, they should have filed a sworn statement setting forth in detail why they could not truthfully admit or deny without taking on a costly and unreasonable burden"⁷⁷ In upholding the defendants' objection to the second request, the supreme court

70. *Id.* at 585-86.

71. 496 S.W.2d 224 (Tex. Civ. App.—Corpus Christi 1973).

72. TEX. R. CIV. P. 167.

73. 501 S.W.2d 299 (Tex. 1973) (1st case).

74. *Id.*

75. 490 S.W.2d 818 (Tex. 1972).

76. TEX. R. CIV. P. 169.

77. 490 S.W.2d at 825.

held that "[t]he rule does not require a litigant to admit or deny the truth or falsity of another person's testimony in the trial of another case"⁷⁸

After the testimony of a witness giving a deposition is fully transcribed, rule 209⁷⁹ requires that the deposition be submitted to the witness for review and signing. If the deposition is not signed due to the "absence of the witness," however, the rule authorizes the deposition to "be used as fully as though signed." Favoring substance over form, the court in *Bell v. Linehan*⁸⁰ concluded that the requirements of rule 209 were met where the failure of a witness to sign his deposition was due to the death of the witness.

*Ramsay v. Santa Rosa Medical Center*⁸¹ illustrates the risks inherent in refusing to submit to discovery ordered by a trial court. The plaintiff, who had previously been committed to a mental institution, brought an action against the institution and two of its medical personnel, claiming his confinement had been unlawful. After learning that plaintiff's commitment had been prompted by the reading of a personal diary kept by the plaintiff, the defendants moved, under rule 167,⁸² to discover the diary subject to in camera inspection by the trial court to determine which portions were relevant. The trial court ordered the production of the diary for in camera examination, but the plaintiff refused. After it was determined that the refusal was willful, the trial court invoked the sanctions authorized by rule 170⁸³ and dismissed the plaintiff's suit. Refusing to find an abuse of discretion, the court of civil appeals concluded that the dismissal was warranted under the circumstances.

IX. SUMMARY JUDGMENT

The intricacy of summary judgment procedure under rule 166-A⁸⁴ is reflected by the decision in *Texas National Corp. v. United Systems International, Inc.*⁸⁵ The plaintiff brought suit on a promissory note executed by the defendant. The petition, which was not verified, alleged all of the elements of the plaintiff's action and had attached to it a copy of the note sued upon. Following the defendant's filing of a general denial, the plaintiff moved for summary judgment. While the affidavit which was submitted in support of the motion stated that the factual allegations contained in the petition are true and correct, neither the original nor a sworn copy of the note was attached to the affidavit. The trial court granted summary judgment in favor of the plaintiff, and the court of civil appeals affirmed. In reversing the judgments of the lower courts, the supreme court concluded the summary judgment proof was deficient in at least two respects.

First, factual statements to support the motion for summary judgment were in the pleadings, not in a sworn motion or affidavit in support of the

78. *Id.*

79. TEX. R. CIV. P. 209.

80. 500 S.W.2d 228 (Tex. Civ. App.—Texarkana 1973), *error ref. n.r.e.*

81. 498 S.W.2d 741 (Tex. Civ. App.—San Antonio 1973), *error ref. n.r.e.*

82. TEX. R. CIV. P. 167.

83. TEX. R. CIV. P. 170.

84. TEX. R. CIV. P. 166-A.

85. 493 S.W.2d 738 (Tex. 1973).

motion. Unless the case is one properly to be decided upon the pleadings, a motion for summary judgment should be supported by its own proof as specified in rule 166-A, and not by reference to the pleadings.⁸⁶ Second, neither the original nor a sworn copy of the note was attached to the motion or the affidavit as required by rule 166-A. Supporting proofs should be attached to the motion or affidavit, not to the pleadings.⁸⁷ The supreme court also reiterated the advisability of attaching the original of the note to the motion or affidavit. While the original of the note carries with it evidence of possession and ownership, a copy does not.⁸⁸ Thus, if a sworn or certified copy, rather than the original of the note, is used, the motion or affidavit must establish that the plaintiff is the present owner and holder and in possession of the note.⁸⁹

X. SPECIAL ISSUE SUBMISSION

No area of civil procedure underwent more change during the past year than that of special issue submission. The new amendments to the Texas Rules of Civil Procedure, which became effective September 1, 1973, literally revolutionized the submission of special issues in Texas.⁹⁰ The changes resulting from these amendments fall into several categories.

First, rule 277⁹¹ now makes it discretionary with the trial court whether to submit separate questions with respect to each element of a case and to submit issues broadly. Hence, an objection to a special issue on the ground that it is "multifarious," "global," "too broad and general" or "is tantamount to a general charge" will no longer be recognized.

Second, inferential rebuttal issues are now prohibited.⁹² Previously, a party was entitled to submission of issues relating to facts which, if established, would inferentially disprove the existence of some essential element of the opponent's claim. The elimination of the use of inferential rebuttal issues will, no doubt, reduce the potential for conflicting jury findings.⁹³

Under former practice the burden of proof on a special issue was placed by framing the burden within the issue, through the manner in which the issue was stated.⁹⁴ If this method complicated the form of the issue, then

86. 493 S.W.2d at 741; *accord*, *Hidalgo v. Surety Sav. & Loan Ass'n*, 462 S.W.2d 540 (Tex. 1971).

87. 493 S.W.2d at 741; *accord*, *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230 (Tex. 1962).

88. 493 S.W.2d at 740; *accord*, *Perkins v. Crittenden*, 462 S.W.2d 565 (Tex. 1970); *Southwestern Fire & Cas. Co. v. Larue*, 367 S.W.2d 162 (Tex. 1963); *Hensley v. Jones*, 492 S.W.2d 283 (Tex. Civ. App.—Houston [14th Dist.] 1973).

89. 493 S.W.2d at 741.

90. *See Civil Procedure Rules Amended*, 36 TEX. B.J. 495 (1973). *See generally* McElhaney, *Texas Civil Procedure, Annual Survey of Texas Law*, 24 SW. L.J. 179, 188 (1970); Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 SW. L.J. 577 (1973); 1 TEXAS PATTERN JURY CHARGES (Supp. 1973).

91. TEX. R. CIV. P. 277.

92. *Id.*

93. *See* G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 48 (1959) [hereinafter cited as HODGES].

94. TEX. R. CIV. P. 277, 2 TEX. R. CIV. P. ANN. 640 (1967). *See generally* HODGES 86-88.

the burden of proof could be placed by a separate instruction.⁹⁵ Completely eliminating any restriction, the new amendments provide that the placing of the burden of proof may be accomplished by separate instructions rather than by inclusion in the question.⁹⁶

A fourth change concerns the use of explanatory instructions and definitions. Previously, an issue was condemned as being too general or multifarious if it inquired about several disputed facts.⁹⁷ An issue was subject to this objection where it included the factual items to be considered by the jury in the definition or explanation of a general term used in the issue.⁹⁸ Eliminating this objection from the arsenal of the trial practitioner, rule 277⁹⁹ now directs the trial court to submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict and "in such instances the charge shall not be subject to the objection that it is a general charge."

A major transformation has also occurred in the submission of negligence cases. Trial courts are now empowered to submit special issues in a negligence action "in a manner that allows a listing of the claimed acts or omissions of any party to an accident . . . with appropriate spaces for answers as to each [such] act or omission . . ." ¹⁰⁰ The trial court is also authorized to submit a single question inquiring whether a party was negligent, including with such question a listing of the acts or omissions corresponding to those listed in the preceding question, and containing appropriate spaces for answers as to each such act or omission.¹⁰¹ A further question may inquire whether the acts or omissions, listing them, "were proximate causes of the accident . . . that is the basis of the suit."¹⁰² Significantly, similar forms of questions may be used in non-negligence cases.¹⁰³

In a case in which issues are raised concerning the negligence of more than one party to a suit, rule 277¹⁰⁴ requires the trial court to submit an issue "inquiring what percentage, if any, of the negligence that caused the accident is attributable to each of the parties found to have been negligent." Furthermore, the trial court is required to instruct the jury to answer the damage issues without any reduction because of any negligence on the part of the person injured.¹⁰⁵

The final change concerns comment by the trial court on the weight of the evidence. Under the former rule, the trial judge was required to frame

95. Tex. R. Civ. P. 277, 2 TEX. R. CIV. P. ANN. 640 (1967). See generally HODGES 88-90.

96. TEX. R. CIV. P. 277.

97. Tex. R. Civ. P. 277, 2 TEX. R. CIV. P. ANN. 640 (1967).

98. See HODGES 113.

99. TEX. R. CIV. P. 277.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1973). See generally Green & Smith, *Negligence Law, No-Fault, and Jury Trial—IV*, 51 TEXAS L. REV. 825, 834-39 (1973).

his charge so as to "not therein comment on the weight of the evidence."¹⁰⁶ This phrase has been deleted.¹⁰⁷ The trial court is now only prohibited from commenting "directly" on the weight of the evidence.¹⁰⁸ Thus, the charge is no longer objectionable because it "incidentally" constitutes a comment on the weight of the evidence.¹⁰⁹

In addition to the recent amendments to the rules, several developments in the field of special issue practice have occurred by way of judicial decision. For example, during the trial in *Jackson v. Fontaine's Clinics, Inc.*,¹¹⁰ evidence was adduced that the decline in the plaintiff's business was due to causes unrelated to certain trade practices of the defendants. The defendants requested special issues inquiring if the business losses of the plaintiff were the proximate result solely of the plaintiff's own conduct and conditions beyond the control of any party. These issues were refused by the trial court. Noting that "the issues requested would rebut the damages resulting from the defendants' acts," the Texas Supreme Court, while reversing on other grounds, held that "if the evidence raises these matters on a new trial, they should be presented to the jury in the form of instructions accompanying the damage issue rather than in the form of separate special issues."¹¹¹ This judicial modification of Texas special issue practice, which prohibits the use of yet another inferential rebuttal issue,¹¹² has been made part of new rule 277,¹¹³ although the prohibition in the rule bars submission of all inferential rebuttal issues.¹¹⁴

Jackson was reversed because the instruction accompanying the damages issue used the phrase "loss of monetary reward" to describe the loss of net profits for which the plaintiff sought compensation. Noting that "no other instruction was given connecting that phrase with net profits or with any other recognized measure of damages," the supreme court concluded that the submission was fatally defective because "it simply failed to guide the jury to a finding of any proper legal measure of damages."¹¹⁵

Rule 272¹¹⁶ stipulates that objections to the charge shall "in every instance" be presented to the trial court "before the charge is read to the

106. Tex. R. Civ. P. 272, 2 TEX. R. CIV. P. ANN. 571 (1967). See generally HODGES 19.

107. See TEX. R. CIV. P. 272.

108. TEX. R. CIV. P. 277.

109. *Id.*

110. 499 S.W.2d 87 (Tex. 1973).

111. *Id.* at 90-91.

112. The use of instructions to place before the jury matters which could be used in defense against an allegation of negligence has been suggested to be the proper practice for several other types of inferential defenses. See *Southern Pac. Co. v. Castro*, 493 S.W.2d 491 (Tex. 1973) (instruction substituted for excuse issue); *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452 (Tex. 1972) (open and obvious issue and discovered peril issues); *Yarborough v. Berner*, 467 S.W.2d 188 (Tex. 1971) (sudden emergency and unavoidable accident issues replaced by instructions); *Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W.2d 444 (Tex. 1967) (issues as to mitigation eliminated); *Dallas Ry. & Terminal Co. v. Bailey*, 151 Tex. 359, 250 S.W.2d 379 (1952) (elimination of new and independent cause).

113. TEX. R. CIV. P. 277; see notes 92 & 93 *supra*, and accompanying text.

114. 499 S.W.2d at 90.

115. *Id.*

116. TEX. R. CIV. P. 272.

jury" Finding that the purpose of the rule was to enable the trial court to submit a proper charge to the jury and to have the prior benefit of counsel's objections so as to correct any errors that might otherwise occur, the supreme court concluded in *Missouri Pacific Railroad v. Cross*¹¹⁷ that it was error for a trial court to approve an agreement between counsel that objections to the charge could be made while the jury was deliberating. Moreover, when objections are made to the charge after it is read to the jury, warns the court, the objections will be considered as "waived."¹¹⁸ The supreme court also found that rule 286,¹¹⁹ which requires that any supplementary instruction given to the jury after it has retired to deliberate be made in writing and presented in open court, was violated where the trial court attempted an oral explanation to the jury in a hallway.

*Monsanto Co. v. Milam*¹²⁰ points out the risk in obscuring a valid objection to the charge by voluminous unfounded objections. Contained in the defendant's 150 objections, which covered forty-two pages of the transcript, was a stock objection to each special issue on the ground that "[t]here are no pleadings to warrant the submission of said issue" ¹²¹ On appeal it was conceded that several issues were not supported by the pleadings. Nevertheless, observing that the stock objections failed to point out distinctly the grounds therefor and were concealed in a multitude of other objections, the supreme court concluded that rule 274¹²² had been violated and for that reason the objections were properly overruled.

XI. JURY PRACTICE

Although rule 233¹²³ states that "[e]ach party to a civil suit shall be entitled to six peremptory challenges in a case tried in the district court," the fact a person is named as a party to a suit does not in itself entitle him to six peremptory challenges.¹²⁴ "In order for each of two defendants to be entitled to the six peremptory strikes allowed by rule 233," reiterates the court in *Shell Chemical Co. v. Lamb*,¹²⁵ "it must appear from the pleadings that the interests of those defendants are antagonistic on an issue with which the jury may be concerned."

An unusual situation was presented in *Lopez v. Allee*.¹²⁶ Two cases were set for jury trial on the same day. The first case was called and after *voir dire* examination, counsel marked their respective jury lists to indicate their peremptory challenges. Prior to the actual selection of the jury, however, the first case was settled. The trial court then returned the prospective

117. 501 S.W.2d 869 (Tex. 1973).

118. *Id.* at 873.

119. TEX. R. CIV. P. 286.

120. 494 S.W.2d 534 (Tex. 1973).

121. *Id.* at 536.

122. TEX. R. CIV. P. 274.

123. TEX. R. CIV. P. 233. See also TEX. REV. CIV. STAT. ANN. art. 2151a (Supp. 1973).

124. *E.g.*, Retail Credit Co. v. Hyman, 316 S.W.2d 769 (Tex. Civ. App.—Houston 1958), *error ref.*

125. 493 S.W.2d 742, 744 (Tex. 1973).

126. 493 S.W.2d 330 (Tex. Civ. App.—San Antonio 1973), *error ref. n.r.e.*

jurors from the first jury list to the panel for the second case. All names on the second panel were shuffled and redrawn to constitute the jury list for the second case. Ultimately, eight jurors whose names had been struck on the jury lists of the first case were placed on the panel for the second case. From an adverse verdict in the second case, the plaintiff appealed, contending that former article 2094a¹²⁷ had been violated. Article 2094a provided that "[o]nce a prospective juror has been removed from a jury panel . . . by peremptory challenge . . . he shall be immediately dismissed from jury service and shall not be placed on another jury panel until his name is returned to the jury wheel and drawn again as a prospective juror." In denying the plaintiff's contention, the San Antonio court of civil appeals stated that "[s]ince no jury had been selected in the first case, it would necessarily follow that no jurors had been peremptorily challenged on such panel."¹²⁸

Article 2151a¹²⁹ provides that "[a]fter proper alignment of parties, it shall be the duty of the court to equalize the number of peremptory challenges provided under Rule 233 . . . in accordance with the ends of justice so that no party is given an unequal advantage because of the number of peremptory challenges allowed that party." In a case of first impression, the court of civil appeals in *Austin Road Co. v. Evans*¹³⁰ concluded that article 2151a authorized the trial court to give the defendant *nine* peremptory challenges so as to equalize the *six* peremptory challenges given to each of three plaintiffs, who had been found to be antagonistic to each other.¹³¹

Hemmenway v. Skibo,¹³² a case in which the plaintiff sued to recover for personal injuries sustained in a collision with the defendant's truck, is a study in jury brinksmanship. After an adverse jury verdict, the defendant, who was apparently being defended by his insurer, appealed, contending that various statements made by plaintiff's counsel during the proceeding were prejudicial. Plaintiff's counsel had asked the jury panel on *voir dire* examination whether any of them worked for an insurance company or investigated any kind of personal injury accidents.¹³³ Next, during the examination of his client, plaintiff's counsel inquired whether he had told the defendant's "people" that he had had two beers prior to the accident "when they

127. Ch. 905, § 14, [1971] Tex. Laws 2801. See also TEX. REV. CIV. STAT. ANN. art. 2094a (Supp. 1973).

128. 493 S.W.2d at 333.

129. TEX. REV. CIV. STAT. ANN. art. 2151a (Supp. 1973). See generally Jones, *Peremptory Challenge—Should Rule 233 Be Changed?*, 45 TEXAS L. REV. 80 (1966).

130. 499 S.W.2d 194 (Tex. Civ. App.—Fort Worth 1973) (2-1 decision), *error ref. n.r.e.*

131. In *Evans* the plaintiffs were motorists traveling single file down a road where visibility was obscured by a combination of dust from lime spread during road construction by the defendants and the weather. In actuality, the three plaintiffs sued each other and the defendant, and the defendant counter-claimed against the third plaintiff, who was last in the line of three cars. The third plaintiff was found to have been negligent and appealed, assigning as error that the defendant received nine peremptory challenges while each plaintiff received only six. The formula used by the trial court to apportion the challenges was not stated.

132. 498 S.W.2d 9 (Tex. Civ. App.—Beaumont 1973), *error ref. n.r.e.*

133. *Id.* at 11-12. See generally Figari, *supra* note 5, at 193.

came and took a sworn statement from you the next day.'"¹³⁴ Later, during his opening argument to the jury, plaintiff's counsel stated that he had produced all of the evidence, and "[w]hen it became time for the defendants to put on the evidence, they rested."'¹³⁵ Plaintiff's counsel continued, stating that "'one other time I remember the defendant didn't put on any evidence in a case was in the Gus Mutscher trial. When the State put on their evidence—.'"'¹³⁶ Finally, during his closing argument, plaintiff's counsel stated, "'I don't want a judgment against this defendant over here and I am asking you, Ladies and Gentlemen, to answer this issue right here . . . [i.e., the damage issue], . . . Ten Thousand Dollars'"'¹³⁷ Concluding that the cumulative effect of the remarks of plaintiff's counsel constituted reversible error, the court of civil appeals remanded the case for a new trial.

XII. JUDGMENT

It is well settled in Texas that a *nunc pro tunc* order may be entered at any time by the trial court to correct a "clerical error" in an earlier judgment.¹³⁸ Since "judicial error" in a judgment is not subject to correction after the expiration of thirty days from its entry, the Texas courts are frequently called upon to distinguish between the two.¹³⁹ *Dikeman v. Snell*¹⁴⁰ is one such instance. The plaintiff brought suit to remove restrictions against the use of his property for commercial purposes. After a jury verdict in favor of the plaintiff, the trial court entered a judgment permitting commercial use of the property provided the plaintiff built a brick fence to separate it from the rest of the subdivision. After the judgment became final, the plaintiff filed a motion to correct it, claiming that provision for a brick fence had been included in the judgment as a result of a clerical error. Sustaining the motion, the trial court entered a *nunc pro tunc* judgment, this time conditioning the commercial use of the property on the construction of a wooden fence. Observing that the *nunc pro tunc* judgment purported to rewrite the decretal portion of the original judgment, the supreme court concluded that it was a nullity because "[i]f inclusion of the original proviso concerning the fence . . . was a mistake, it was a judicial and not a clerical mistake."¹⁴¹

134. 498 S.W.2d at 12.

135. *Id.* at 13.

136. *Id.*

The court of civil appeals took judicial notice of the facts behind this reference which alluded "to the criminal trial of the former Speaker of the Texas House of Representatives who did not take the stand in his own defense or offer affirmative testimony upon the trial." The Mutscher trial, which resulted in a verdict of guilty, had been widely publicized throughout Texas. *Id.* at 13 n.5.

137. *Id.* at 13.

138. See generally 4 R. McDONALD, TEXAS CIVIL PRACTICE § 17.08.1 (Elliott rev. 1971); Reavley & Orr, *Trial Court's Power To Amend Its Judgments*, 25 BAYLOR L. REV. 191 (1973).

139. See, e.g., *Universal Underwriters Ins. Co. v. Ferguson*, 471 S.W.2d 28 (Tex. 1971); *Finlay v. Jones*, 435 S.W.2d 136 (Tex. 1968); *Knox v. Long*, 152 Tex. 291, 257 S.W.2d 289 (1953); *Nevitt v. Wilson*, 116 Tex. 29, 285 S.W. 1079 (1926) (2d case); *Coleman v. Zapp*, 105 Tex. 491, 151 S.W. 1040 (1912).

140. 490 S.W.2d 183 (Tex. 1973).

141. *Id.* at 186.

XIII. MOTION FOR NEW TRIAL

A curious situation involving the grant of a motion for new trial was presented in *Travelers Express Co. v. Winters*.¹⁴² Six days after the rendition of judgment against her, the defendant filed a motion for new trial. The trial court orally granted the motion eight days after its filing, but no written order was ever entered. Finally, on the eighty-eighth day after the filing of the motion the trial court entered a *nunc pro tunc* judgment granting to the defendant a new trial. Overruling the plaintiff's contention that rule 329b¹⁴³ divested the trial court of jurisdiction to enter a judgment granting a new trial at such a late date, the appellate court concluded that "[t]he oral order of the court granting the new trial was valid and the entry of the order was only a ministerial act."¹⁴⁴

It has not always been clear whether a defendant seeking to set aside a default judgment through the timely filing of a motion for new trial must exonerate himself from all negligence in failing to answer.¹⁴⁵ The El Paso court of civil appeals has concluded "that where an appeal from a default judgment is by motion for new trial the issue is not based upon negligence but whether the conduct was intentional or the result of conscious indifference."¹⁴⁶

XIV. APPELLATE PROCEDURE

Upon a showing of "good cause," rule 386¹⁴⁷ authorizes the court of civil appeals to extend the time for filing the transcript and statement of facts. *Embry v. Bel-Aire Corp.*,¹⁴⁸ a recent decision by the Supreme Court of Texas, reiterates the liberal construction to be given rule 386. The appellant filed a motion for extension of time in which to file the statement of facts and transcript, showing that the court reporter had moved out of state and would be unable to prepare the *statement of facts* within the prescribed period. The motion was granted by the court of civil appeals, and the statement of facts and transcript were filed within the extended time. Later, however, the court set aside its order of extension and dismissed the appeal for want of jurisdiction, because the appellant had not requested a *transcript* from the clerk until four days after he had filed his motion for extension of time. Reinstating the appeal, the supreme court declared that a timely motion which asserts as grounds for late filing the fact that the statement of facts for good cause is not ready, is also sufficient reason for the late filing of the transcript, irrespective of when the request for the transcript is made to the clerk.

142. 488 S.W.2d 890 (Tex. Civ. App.—El Paso 1972), *error ref. n.r.e.*

143. Tex. R. Civ. P. 329b.

144. 488 S.W.2d at 892.

145. *Compare* Young v. Snowcon, Inc., 463 S.W.2d 225 (Tex. Civ. App.—Houston [14th Dist.] 1971), *with* City of San Antonio v. Garcia, 243 S.W.2d 252 (Tex. Civ. App.—San Antonio 1951), *error ref.*

146. Continental Airlines, Inc. v. Carter, 499 S.W.2d 673, 675 (Tex. Civ. App.—El Paso 1973).

147. Tex. R. Civ. P. 386.

148. 502 S.W.2d 543 (Tex. 1973).

A case which caused the supreme court to see double is *Anderson v. Casebolt*.¹⁴⁹ After judgment was entered and had become final, the trial court attempted to set it aside and render the same judgment a second time. Noting that the two judgments were identical except for the date of entry, the supreme court held that "the second judgment could serve no purpose other than to enlarge the time for appeal."¹⁵⁰ Consequently, the time for appeal was deemed to have commenced running from the entry of the first judgment.

XV. RES JUDICATA

The most significant development concerning the doctrine of res judicata is the supreme court's decision in *Griffin v. Holiday Inns of America*.¹⁵¹ The plaintiff contractor sued the defendant to recover the balance claimed to be owed under a construction contract. The defendant responded that the contractor had not performed in accordance with the contract and asserted a cross-action to recover for the contractor's breach of the contract. After a trial on the merits, a judgment was entered that the plaintiff and defendant take nothing by their respective claims. Later, after the judgment became final, the plaintiff filed a second suit against the defendant, this time to recover *in quantum meruit* for the value of labor and materials furnished under the contract. The trial court sustained the defendant's motion for summary judgment on the ground that the judgment in the first suit was res judicata of the *quantum meruit* claim, and the court of civil appeals affirmed. Resolving a conflict in the Texas cases,¹⁵² the supreme court held "that a judgment for the defendant in a suit for breach of contract on the ground that he is not liable for breach of contract does not preclude a subsequent suit *in quantum meruit*, the causes of action being regarded as different for res judicata purposes."¹⁵³

Griffin is also significant for its consideration of the effect of the failure of a party to assert a compulsory counterclaim. Rule 97¹⁵⁴ requires that a pleading "shall state as a counterclaim" any claim within the jurisdiction of the court which the pleader has against any opposing party "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Observing that the claim *in quantum meruit* arose out of the transaction that was the subject matter of the cross-action in the first suit, the supreme court concluded that the claim *in quantum meruit* "was a compulsory counterclaim to the cross-action under the provisions of Rule 97" and "[t]he judgment in the first suit is conclusive of the claim for that reason"¹⁵⁵

149. 493 S.W.2d 509 (Tex. 1973).

150. *Id.* at 510.

151. 496 S.W.2d 535 (Tex. 1973).

152. Compare *Griffin v. Holiday Inns of America*, 480 S.W.2d 506 (Tex. Civ. App.—Austin 1972), error granted, with *Whitney v. Parish of Vernon*, 154 S.W. 264 (Tex. Civ. App.—Galveston 1913), error ref., and *Henrietta Nat'l Bank v. Barrett*, 25 S.W. 456 (Tex. Civ. App. 1894), error ref.

153. 496 S.W.2d at 538; see RESTATEMENT OF JUDGMENTS § 65, comment j (1942).

154. TEX. R. CIV. P. 97.

155. 496 S.W.2d at 539. But see *Leon v. Noble*, 234 S.W.2d 454 (Tex. Civ. App.—Eastland 1950).

*Maxey v. Citizens National Bank*¹⁵⁶ concerned a bizarre series of procedural events. The plaintiffs brought suit against a bank, two of its related companies, and several of its representatives, claiming fraudulent conversion. Due to the granting of motions for summary judgment and motions for instructed verdict, only the claims against the bank were ultimately submitted to the jury. Based on the findings of the jury, judgment was entered against the bank for approximately \$2,500,000. The bank subsequently perfected an appeal and was successful in obtaining a new trial.¹⁵⁷ On remand, the bank filed a motion for summary judgment, contending that the earlier summary judgments and instructed verdict judgments in favor of the other defendants, which were neither severed nor appealed, operated to bar or estop the plaintiffs from proceeding further against the bank. The trial court granted the bank's motion for summary judgment and an appeal followed. Affirming the action of the trial court, the court of civil appeals concluded that "[a]s plaintiffs' pleadings were drafted, the culpability of the bank, if any, depended solely on whether the actions of its representatives were tortious," and "[w]hether they were culpable in fact has been foreclosed by the judgments of absolution plaintiffs permitted to become final."¹⁵⁸

XVI. MISCELLANEOUS

In *Acme Color Art Printing Co. v. Brown*¹⁵⁹ the court of civil appeals reviewed the capacity of a corporation to file suit at a time when its charter was forfeited under article 12.17 of the tax code¹⁶⁰ for failure to pay franchise taxes. Asserting the lack of capacity on the part of the corporate plaintiff, the defendant filed a plea in abatement, attaching a certificate of the secretary of state showing that plaintiff's corporate charter had been forfeited a year earlier. At a hearing on the plea, however, the plaintiff established that its franchise taxes had been paid and its charter reinstated a few days before the hearing. The trial court granted the plea and dismissed the suit. Noting that "[t]he sole purpose of the statute is to raise revenue, and that purpose is best served by encouraging a delinquent corporation to obtain revival of its privileges and access to the courts by paying the amount due the state," the Dallas court of civil appeals concluded "that a corporation may maintain a suit commenced when its corporate powers were suspended if its powers are reinstated before the suit is dismissed"¹⁶¹

In *Pearson Grain Co. v. Plains Trucking Co.*,¹⁶² a case of first impression, the defendant was served with a writ of garnishment after it had issued

156. 489 S.W.2d 697 (Tex. Civ. App.—Amarillo 1972), *error granted*.

157. *Citizens Nat'l Bank v. Maxey*, 461 S.W.2d 138 (Tex. Civ. App.—Amarillo 1970), *error ref. n.r.e.*

158. 489 S.W.2d at 705. [Editor's Note: The Texas Supreme Court subsequently reversed the trial court and court of civil appeals, and remanded the case for a new trial. 17 Tex. Sup. Ct. J. 244 (1974). The court held that the bank's liability rested on its contractual liability as chattel mortgagee and, thus, was not derivative of the acts of its employees. The finality of the judgments in favor of the employees was, therefore, not properly a basis for res judicata or collateral estoppel.]

159. 488 S.W.2d 507 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*

160. TEX. TAX-GEN. ANN. art. 12.17 (1969).

161. 488 S.W.2d at 508.

162. 494 S.W.2d 639 (Tex. Civ. App.—Amarillo 1973), *error ref. n.r.e.*

a check in payment of a note made by the garnishor's judgment debtor in favor of a fourth party. Service was made before the payment of the check by the drawee bank. The garnishor sued to recover the full amount of the garnishee's debt to the judgment debtor even though the garnishee purported to have discharged such debt by the check. The garnishor argued that the check was not an assignment of funds until it was processed and that the service of the writ had taken place after the issuance, but before the presentation of the check, and that, therefore, the garnishee had a duty to stop payment of the check. By allowing the check to be paid, the garnishor argued, the garnishee remained liable on the debt for purposes of garnishment. Noting that no request was made to the garnishee to stop payment, the court of civil appeals held that the garnishor could enforce against the garnishee only those debts the judgment debtor himself could enforce. Here, by mutual agreement between the garnishee and the judgment debtor, the issuing and mailing of the check had discharged the debtor's rights against the garnishee.

A plaintiff seeking a non-suit after his opponent has incurred discovery expenses should take note of *Harris v. Shotwell*.¹⁶³ The trial court permitted the plaintiffs to non-suit their action without taxing against them certain deposition costs incurred by the defendant. Finding an abuse of discretion on the part of the trial court, the court of civil appeals construed rule 131,¹⁶⁴ which states that "[t]he successful party to a suit shall recover of his adversary all costs incurred therein," to require the taxation of the deposition costs against the plaintiffs.

Article 2226,¹⁶⁵ which authorizes the recovery of a reasonable attorney's fee in specified cases, has been held not to require that the claim be presented thirty days prior to the filing of suit.¹⁶⁶ The demand may be made after suit is filed; however, the filing of suit is not of itself a presentment of the claim within the terms of the statute.¹⁶⁷

163. 490 S.W.2d 860 (Tex. Civ. App.—Fort Worth 1973).

164. TEX. R. CIV. P. 131.

165. TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1973).

166. *El Paso Moulding & Mfg. Co. v. Southwest Forest Indus., Inc.*, 492 S.W.2d 331 (Tex. Civ. App.—El Paso 1973), *error ref. n.r.e.*

167. *Id.*